IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 416 of 1990

Shri Dadu Dhondi Kare

since deceased by his LRs

1A Baburao Dadu Kare

1B Rama Dadu Kare

1C Tanaji Dadu Kare

1D Vithal Kare

since deceased by his LRs

A Taibai Vithal Kare

B Umesh vithal Kare

C Mahesh Vithal Kare

D Sulbha Vithal Kare

1E Vishwas Dadu Kare

1F Bhagubai Dadu Kare

1M Yesavau Atmaram Hubale

1T Balabai Rasghing Madane

1G Harna Ganu Mane

1S Kamalabai Aba Bhise Dhangar..Appellants

V/s

1. Shri Pandurang Anna Kamble

2. Vithal Dadu Kare

since deceased through L.Rs

2A Taibai Vithal kare

2B Umesh Vithal Kare

2C Mahesh Vithal Kare

2D Sulbha Vithal Kare

3. Bhagubai Dadu Kare ..Respondents

(Dismissed as Respdt no.3 as

per order dated 21-10-94)

Ms Anita Bhaktwani i/b S.P.Kanuga for Appellants

Shri B.R.Patil for Respondents

CORAM: S.R.SATHE,J.

DATED:30th August 2004

ORAL JUDGMENT :-

1. Being aggrieved by the judgment and order passed by the 2nd Additional District Judge, Sangli in Regular Civil Appeal No.295 of 1984 dated 25-3-1990 whereby the order passed by the Court of Civil Judge, J.D. Islampur in Regular Civil Suit No.302 of 1978 dated 30-4-1984 whereby dismissing the plaintiff’s suit was set aside and the appeal was allowed and the plaintiff’s suit for possession was decreed, the original defendants have preferred this second appeal.

2. For the sake of convenience hereinafter the parties shall be referred to as the plaintiff and defendants.

3. Brief facts giving rise to this second appeal are as under :-

4. House property bearing CTS No.1703 situated at Islampur was ancestral property of Kondi Rama Shriram and Bandu Rama Shriram. Bandu Rama Shriram died leaving behind Dnyanu Bandu Shriram. As Dnyanu Bandu was residing at Mumbai the suit property was entered in the name of Kondi Rama. Kondi Rama died issueless. During his life time he had sold western portion of the suit property to the extent of his share to one Sitabai Mahadev Sawant by virtue of sale deed dated 20-4-1926. The western portion of the said survey number which is admeasuring 25’ x 17 & 1/2’ is in fact the disputed land in question. According to the plaintiff though it was in fact not necessary for Dnyanu to get the sale deed executed from Sitabai, on 17-9-1959 such sale deed was executed. Thereafter on 10-5-1974 Dnyanu sold the property to the plaintiff. It is plaintiff’s case that though the defendant was not at all in any way concern with the suit property, some time in the year 1974 he

started obstructing the plaintiff's possession of the suit property i.e. western side open portion, described in the present suit as "1B". Plaintiff therefore, filed Regular Civil Suit No.312 of 1974 against the defendant s for perpetual injunction restraining the defendants from obstructing plaintiff's possession of the suit property. The said suit was dismissed on 28-7-1976. Plaintiff, therefore, filed Civil Appeal NO.290/1976. However, on 14-6-1978 the plaintiff withdrew the said appeal. It is plaintiff's case that thereafter the defendant was all along saying that he has purchased the suit property from one Balwant Mahadeo Sawant. According to the plaintiff the defendant was not at all concerned with the suit property nor he was in actual possession of the same hence on 6-10-1978 plaintiff filed the present suit for declaration that suit property is of his ownership. He also claimed for damages.

5. The defendants filed their written statement at Exh.15 and opposed the suit claim. He contended that the present plaintiff had filed in earlier suit i.e. Regular Civil Suit NO.312 of 19074 and the said suit has already been dismissed and as such the finding recorded in the said suit operates as res judicata and the present suit is barred by

principle of res judicata. Besides this the defendant has also contended that the plaintiff is not at all the owner of the suit property nor the suit property was in his possession at any time. On the contrary the suit property described in para 1B of the plaint is purchased by the defendants under 2 sale deeds dated 6-7-1971 and 4-6-1974 and since then the suit property is in possession of the defendants. The defendants therefore prayed that plaintiff is not entitled for declaration as prayed for. Defendants also contended that suit is barred by law of limitation. Hence on these grounds Defendants prayed for dismissal of the suit. On these pleadings the learned trial Judge framed issues at Exh.31. After considering the evidence adduced by both the parties the trial Court came to the conclusion that the present suit is barred by principle of res judicata. He also held that the plaintiff has failed to prove that he is owner of the suit property. Naturally he dismissed the suit.

6. Being aggrieved by the same the plaintiff filed Regular Civil Appeal No.295 of 1984. As the said appeal was allowed and declaration was granted in favour of the plaintiff, the original defendants have filed this second appeal.

7. From the perusal of the record, it appears that on 2-8-1990 when the appeal was for admission, this Court passed the following order.

> "Admit. The question (susbtantial) of law is whether the present suit is barred by res judicata in view of the decision in Regular C.Suit NO.312 of 1972".

8. In this appeal before me the learned Advocate for the Appellant has urged two points. Firstly she submitted that finding recorded by the first appellate court to the effect that the suit is not barred by principle of res judicata is incorrect. Secondly, she canvassed that there is sufficient material on record to hold that the suit property is in fact owned and possessed by the defendants and as such the decree for declaration granted in favour of the plaintiff is not legal. As against this the learned advocate for the Respondents supported the judgment and order passed by the first appellate Court.

9. It is not in dispute that the suit property was initially owned by Kondi Rama Shriram and Bandu Rama Shriram and Bandu Rama died leaving behind

Dnyanu as the only son. The execution of the sale deed dated 20-4-1926 in favour of Sitabai Mahadeo Sawant is also not in dispute. It is also an admitted fact that previously the present plaintiff had filed Regular Civil Suit NO.312 of 1974 against the present defendants for permanent injunction and the said suit was dismissed and the appeal preferred by the present plaintiff was withdrawn by him on 14-6-1978. It is also an admitted fact that the said suit was in respect of the present suit property. It was between the same parties and same has been finally decided. It is the contention of the defendants that present suit is barred by principle of res judicata. Naturally it is necessary to find out as to what was the issue directly and substantially involved in the earlier suit and which is the issue directly and substentially involved in the present suit, because all other things viz. parties to the suit, jurisdiction of the court, subject matter of the suit are admittedly not in dispute. It was argued on behalf of the plaintiff that earlier suit was a suit simplicitor for permanent injunction and as such there was no question regarding the ownership of the plaintiff and hence even if any finding is recorded in that behalf the said cannot be said to be a finding on issue which was directly and

sustentially involved in the said matter.As against this the learned advocate for the defendants submitted that even if that was a suit for permanent injunction, taking into consideration the averments made in the plaint as well as the contention raised by the defendants specific issue regarding ownership was framed in the said suit and after considering the evidence of both the parties finding was recorded by the Court on the said issue that the defendant has failed to prove that he is the owner of the suit property. Thus according to her that was the susbtential issue which was involved in the said suit. In the present suit also the direct and material issue involved is that whether the plaintiff is owner of the suit property. As the said suit has been finally decided in earlier proceedings. The present suit is barred by principle of res judicata. In order to substantiate this proposition she has also placed reliance on a case of Sulochana Amma V/s Narayanan Nair reported in AIR 1994 SC 152. In this authority the apex Court has observed that "It is settled law that in a suit for injunction when title is in issue for the purpose of granting injunction, the issue directly and susbtantially arises in that suit between the parties. When the same issue is put in issue in a later suit based on

title between the same parties or their privies in a subsequent suit the decree in the injunction suit equally operates as res judicata". It is further observed that even the decree founded on equitable relief in which the issue was directly and substantially in issue and decided, and attained finality would operate as re judicata in a subsequent suit based on title where the same issue directly and substantially arises between the parties.

10. Thus in view of the above observations it is very clear that the present suit is barred by principle of res judicata as the issue with regard to the ownership was directly and susbtentially an issue in the earlier proceedings and the same has been finally decided. So I think that finding recorded by the first appellate court holding that the present suit is not barred by principle of res judicata as the earlier suit was for simplicitor for permanent injunction and the issue regarding ownership was not main issue is not legal and correct. Thus substential question of law involved in this matter has to be answered in favour of the present Appellant.

11. In this view of the matter the appeal is

allowed. The order passed by the IInd Additional District Judge, Sangli in Regular Civil Appeal NO.295 of 1984 is set aside and plaintiff's suit for declaration and damages is dismissed with costs.

(S.R.SATHE,J.)